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No. 93-1742

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

JUN 17 PAGE

LUMMI INDIAN TRIBE,
PETITIONER
vs.
WHATCOM COUNTY, WASHINGTON;
BARBARA CORY, TREASURER
OF WHATCOM COUNTY,
RESPONDENTS.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION OF THE BLACKFEET TRIBE OF INDIANS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF *CERTIORARI* AND BRIEF OF *AMICUS CURIAE* BLACKFEET TRIBE OF INDIANS IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

Jeanne S. Whiteing
Counsel of Record
Tod J. Smith
Whiteing & Thompson
1136 Pearl Street, Suite 203
Boulder, Colorado 80302
(303) 444-2549

Counsel for *Amicus Curiae*
Blackfeet Tribe of Indians

June 1, 1994

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Jeanne S. Whiteing
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1136 Pearl Street, Suite 203
Boulder, Colorado 80302
(303) 444-2549

June 1, 1994

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Blackfeet Tribe of Indians

MOTION OF THE BLACKFEET TRIBE OF INDIANS FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Blackfeet Tribe of Indians of the Blackfeet Reservation, Montana (the "Tribe"), through its attorneys and pursuant to Supreme Court Rule 37.4, respectfully moves this Court for leave to file a brief as amicus curiae in support of the Petition for Writ of Certiorari filed on behalf of the Lummi Indian Tribe.* A copy of the letter by which counsel for the Petitioner has consented to the Tribe's participation as amicus curiae is attached at Appendix A. Counsel for the Respondent Whatcom County, Washington has told counsel for the Petitioner that the Respondent will not consent to the participation of any amicus. The Tribe hereby files this motion with the belief that the nature of the Tribe's interest, set forth below, will provide this Court with a unique perspective from which to review the issues raised in this proceeding.

DISCUSSION

The Tribe is a federally recognized tribe organized under the Indian Reorganization Act of June 18, 1934, 48 Stat. 986, as amended, 25 U.S.C. § 461 et seq. The Tribe owns land in fee within the boundaries of the Blackfeet Reservation which was patented pursuant to statutes other than the General Allotment Act, Act of Feb. 8, 1887, 24 Stat. 388, as amended, 25 U.S.C. 331 et seq.

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* The Petition was filed with the Court on May 2, 1994. Counsel for Petitioner was informed that the Whatcom County Prosecuting Attorney's Office received the Petition on that same day. Pursuant to Supreme Court Rule 37.2, this Motion and Amicus Brief must be filed by June 1, 1994. See also S.Ct. Rule 29.2.

In 1986, the Tribe filed suit in the United States District Court for the District of Montana challenging the imposition of state property taxes against real property owned in fee by the Tribe within exterior boundaries of the Blackfeet Indian Reservation. See Blackfeet Tribe v. LaFaver, No. CV-86-23-GF (D. Mont.). The Tribe, the State of Montana and the two affected counties negotiated a resolution of that case in which the State parties agreed to return taxes previously collected on the tribally owned properties, to cancel all entries of property tax delinquencies or liens against the tribally owned properties, and to discontinue assessing or demanding payment of property taxes attributable to any real property solely owned by the Tribe or attributable to its ownership interest in a parcel of property.

The question presented in the Petition for Writ of Certiorari is an issue this Court left unanswered when it decided County of Yakima v. Yakima Indian Nation, 502 U.S. ___, ___, 112 S.Ct. 683, 694, 116 L.Ed.2d 687 (1992): whether lands owned by an Indian tribe and patented in fee under statutes other than the General Allotment Act, 25 U.S.C. § 331, et seq., are subject to a state ad valorem tax absent an unmistakably clear congressional grant of such taxing authority to the states. That issue directly affects and impacts certain fee lands owned by the Tribe as well as the legitimacy of the law and policy that is the foundation of the Tribe's Agreement with the State parties. The Tribe and the State parties have relied on this Agreement since its execution in January, 1987. The Tribe is vitally concerned that the protections afforded its property under the Agreement continue in full force and effect consistent with federal law and policy. Those laws and policies are directly at issue in Lummi Indian Tribe v. Whatcom County, Washington, Case No. 93-1742 (Petition filed May 2, 1994), and the protections afforded the Tribe are threatened should the decision of the United States Court

of Appeals for the Ninth Circuit in Lummi Indian Tribe v. Whatcom County Washington, et al., 5 F.3rd 1355 (9th Cir. 1993) be allowed to stand.

WHEREFORE, the Blackfeet Tribe of the Blackfeet Indian Reservation, Montana, respectfully requests that this Court GRANT its Motion to File Brief Amicus Curiae in Support of the Petition for Writ of Certiorari.

Respectfully submitted,

/s/

Jeanne S. Whiteing
Counsel of Record
Tod J. Smith
Whiteing & Thompson
1136 Pearl Street, Suite 203
Boulder, Colorado 80302
(303) 444-2549

Counsel for Amicus Curiae
Blackfeet Tribe of Indians

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INTEREST OF AMICUS CURIAE

The interests of the Blackfeet Tribe of Indians of the Blackfeet Reservation (the "Tribe") are set forth in the foregoing Motion for Leave to File Brief Amicus Curiae in Support of Petition for Writ of Certiorari and are incorporated herein by reference.

STATEMENT OF THE CASE

The background, nature and disposition of the proceedings before the United States Court of Appeals for the Ninth Circuit are set forth in the Petition for Writ of Certiorari (hereafter cited as "Petition at ___") filed by the Lummi Indian Tribe. See Petition at 2-6.

SUMMARY OF ARGUMENT

Supreme Court Rule 10.1(c) indicates that a Petition will be considered when:

> a . . . United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

This case not only fulfills both requirements, but has ramifications throughout Indian country because numerous Indian tribes, including the Blackfeet Tribe, have acquired and currently own land in fee that was not originally patented pursuant to the General Allotment Act, Act of February 8, 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 et seq.

In County of Yakima v. Yakima Indian Nation, 502 U.S. ___, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992)

(hereafter "Yakima"), this Court left for later resolution the issue of whether a state can impose an ad valorem tax on Indian owned land that was patented in fee pursuant to statutes other than the General Allotment Act. 112 S.Ct. at 694. That issue is presented in the Lummi Tribe's Petition with respect to land acquired and owned in fee by that Tribe. In resolving that issue in favor of state taxation, the Ninth Circuit held that the statute under which the land was allotted did not matter, the sole determining factor being whether the land was alienable. See Lummi Indian Tribe v. Whatcom County, Washington, et al., 5 F.3d 1355, 1359 (9th Cir. 1993) (hereafter "Lummi") ("We hold that . . . [b]ecause the parcels are alienable, they are also taxable."). This holding is in direct conflict with this Court's analysis in Yakima as well as a long line of cases which require that Congress make its intent to tax Indian land unmistakably clear. It is now incumbent upon this Court to issue the writ of certiorari and address the issue it left unanswered in Yakima by reversing the Ninth Circuit and, once again "lay[ing] to rest any doubt . . . that . . . taxation [of Indian land] is not permissible absent [explicit] congressional consent." State of California v. Cabazon Band of Indians, 480 U.S. 202, 215 n. 17, 107 S.Ct. 1083, 1091 n.17, 94 L.Ed.2d 244 (1987).

REASONS THE WRIT SHOULD BE ISSUED

A. The Ninth Circuit's Decision Ignores the Analysis this Court Applied in Yakima Which Requires an Unmistakably Clear Congressional Grant to the States of the Authority to Tax Indian Land.

In Yakima this Court asked, but did not directly answer, whether Indian owned fee land alienated pursuant to statutes other than the General Allotment Act was subject to state taxation. Yakima, 112 S.Ct. at

694.[1] But the Court's analysis in Yakima leads to the answer to the question posed: while Congress may allow an Indian to alienate land, a state cannot tax that land absent specific congressional authorization explicitly providing for and defining the extent and nature of the state's taxing authority. This analysis follows what has oft times been referred as the per se rule of state taxation of Indian tribes: Indian property is never subject to state taxation absent explicit congressional authorization. See Yakima, 112 S.Ct. at 687-88.[2] While the Court

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[1] The Court also did not directly address the effects of an Indian tribe subsequently acquiring land previously alienated by individual Indians pursuant to the terms of the General Allotment Act.

[2] An explicit congressional declaration is required because "although tax exemptions generally are to be construed narrowly, in 'the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal. . . .' Choate v. Trapp, 224 U.S. [665,] at 675, 56 L.Ed. 941, 32 S.Ct. 565 [1912]." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 n.4, 105 S.Ct. 2399, 2403 n.4, 85 L.Ed.2d 753 (1985). Such a liberal construction required the continuation of the tax exemption enjoyed by Indian trust patent holders when their land was patented in fee, absent a congressional declaration to the contrary. The Burke Act, Act of May 8, 1906, 34 Stat. 182, 25 U.S.C. § 349, included such an explicit declaration with respect to lands patented under the General Allotment Act. See Yakima, 112 S.Ct. at 694.

Moreover, the courts must construe the statutes "liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Yakima, 112

(continued...)

recognized that the Indian owned land was implicitly subject to state taxation only if it was alienable, it only upheld the State of Washington's authority to impose its ad valorem tax on Indian land owned in fee, upon its determination that Congress explicitly authorized such a tax in the Burke Act. The Lummi decision directly conflicts with this Court's analysis in Yakima, because the Lummi court upheld state taxation based solely on the fact that the land had, prior to its acquisition by the Lummi Tribe, been allotted under the Treaty of Point Elliot and, at some later point, sold.[3]

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[2](...continued)
S.Ct. at 693, quoting, Montana v. Blackfeet Tribe, 471 U.S. 759. Any ambiguity created by Congress' failure to explicitly address the issue of state taxation over Indian owned fee lands must be resolved in favor of the Indians and against state taxation.

[3] There is no question that the land at issue in Lummi is located within the boundaries of the Lummi Indian Reservation and, therefore within Indian country. See 18 U.S.C. § 1151. In Indian country, federal policies and statutes do not distinguish between tribal property held in fee as opposed to that held in trust. See, e.g., Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 986, as amended, 25 U.S.C. § 461, et seq.; Bryan v. Itasca County, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976). See generally F. Cohen, Handbook of Federal Indian Law, 34-38, 520 (1982 ed.). Moreover, this Court recently refused to draw such a distinction absent an explicit congressional directive. See Oklahoma State Tax Comm'n v. Sac and Fox Nation, 508 U.S. ___, ___, 113 S.Ct. 1985, 1992, 124 L.Ed.2d 30 (1993) ("Additional congressional enactments support our conclusion that the McClanahan presumption against state taxing authority
(continued...)

The Court in Yakima was correct when it reiterated and applied its longstanding approach to tribal-state taxation issues by following the per se rule precluding state taxing jurisdiction over Indian land absent express congressional consent. The Court has recognized that special rules apply in the area of Indian taxation which mandate that the courts decline "to find that Congress has authorized state taxation unless it has 'made its intention to do so unmistakably clear. Montana v. Blackfeet Tribe, 471 U.S. [at] 765 . . .." Yakima, 112 S.Ct. at 688. See Mescalero Apache v. Jones, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (1973); California v. Cabazon, supra, 480 U.S. at 215 n.17.[4]

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[3](...continued)
applies to all Indian country . . .." There is, therefore, no basis to support the distinction the Lummi court decision draws between tribally owned fee and trust land.

[4] In Mescalero Apache v. Jones, the Court held that:

> in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan v. Arizona State Tax Comm'n, [411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973)], lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.

411 U.S. at 148.

In Cabazon, the Court was considering the

application of state gaming laws to tribal gaming operations. In this regulatory context the Court found that the rule precluding state jurisdiction over tribes was not an "inflexible per se rule." Cabazon, 480 U.S. at 215. However, the Court noted that in the special area of state taxation of Indian tribes there is a per se rule which is inflexible and is not subject to a rebalancing of interests in every case. Without question, the per se rule precludes state taxing jurisdiction in the absence of explicit and unambiguous congressional consent. Id. at 215 n.17.

Unlike the Ninth Circuit in Lummi, the Yakima Court did not deviate from this per se rule; rather it found within the language of the Burke Act proviso, 25 U.S.C. § 349, the necessary explicit congressional consent to state taxation of Indian land which was patented in fee pursuant to the terms and conditions of the General Allotment Act.

The Court recently considered the State of Oklahoma's claim that its authority to tax Indian earnings and vehicles was only limited by formal reservation boundaries. See Oklahoma Tax Comm'n. v. Sac and Fox Nation, 113 S.Ct. 1985. While finding that "Indian country" not "Indian reservations" established the limits of state taxing jurisdiction, the Court once again reaffirmed the per se rule applicable to tribal-state taxation issues:

> Although "exemptions from tax laws should, as a general rule, be clearly expressed," McClanahan, 411 U.S., at 176, the tradition of Indian sovereignty requires that the rule be reversed when a state attempts to assert tax jurisdiction

See also Bryan v. Itasca County, 426 U.S. 373 (exclusion of state from the taxation of Indian property is not dependent upon the trust status of the property).

The Ninth Circuit believed that the Yakima Court's apparent approval of the logic propounded in Goudy v. Meath, 203 U.S. 146, 27 S.Ct. 48, 51 L.Ed. 130 (1906) led to the "virtually inescapable conclusion that the Lummi land is taxable if it is alienable." Lummi, 5 F.3d at 1358.[5] The inaccuracy of that court's belief becomes evident with a review of the Yakima Court's evaluation of the validity of the application of the State of Washington's excise tax on the sale of Indian owned fee lands. The Court did concede that the logic propounded in Goudy could lead to the application of the full spectrum of state property tax laws:

> over an Indian tribe or tribal members [in Indian country] . . ..
>
> * * *
>
> [O]ur cases require the court to analyze the relevant treaties and federal statutes against the backdrop of Indian sovereignty. Unless Congress expressly authorized tax jurisdiction in Indian country, the McClanahan presumption counsels against finding such jurisdiction.

113 S.Ct. at 1991-92.

[5] Even the Goudy Court itself appears to have recognized that the ambiguities in the language of § 5 of the General Allotment Act did not lead "inescapably" to the conclusion that Indian owned fee land was taxable. See Yakima, 112 S.Ct. at 691, quoting from Goudy v. Meath, 203 U.S. at 149.

> [i]t does not exceed the bounds of permissible construction to interpret "taxation of land" as including taxation of the proceeds from sale of land; and it is even true that such a construction would be fully in accord with Goudy's emphasis upon the consequences of alienability, which underlay the Burke Act proviso.

Yakima, 112 S.Ct. at 693 (emphasis added). However, the Court recognized that it was the Burke Act proviso, not the consequences of alienability that provided the states with the authority to tax -- but only to the extent the Act clearly and unambiguously authorized the type of tax being imposed.[6] And, as the Court held, Congress only authorized a tax on land, not on the proceeds from the sale of land, in the Burke Act proviso:

> It is quite reasonable to say . . . that though the object of the sale here is land, that does not make land the object of the

---

[6] Absent an explicit congressional declaration establishing the scope and nature of the states' authority to tax alienable Indian land owned in fee, the inherent ambiguities in the statutory language allowing for alienation must be "construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Yakima, 112 S.Ct. at 693. Applying this "deeply rooted principle of Indian jurisprudence," id., alienability, in and of itself, cannot be construed to authorize state taxation to the detriment of the Indians. And, the Court need look no further than the history of the General Allotment Act to determine that state taxation is a detriment to Indian land holdings. See Yakima, 112 S.Ct. 697-96 (Blackmun, J., concurring in part and dissenting in part).

> tax, and hence does not invoke the Burke Act proviso.
>
> * * *
>
> The short of the matter is that the General Allotment Act [in the Burke Act proviso] explicitly authorizes only "taxation of . . . land" not "taxation with respect to land," "taxation of transactions involving land," or "taxation based on the value of land." Because it is eminently reasonable to interpret that language as not including a tax upon the sale of real estate, our cases require us to apply that interpretation for the benefit of the Tribe. Accordingly, Washington's excise tax on sales of land cannot be sustained.

Yakima, 112 S.Ct. at 693-94 (emphasis added). If the Lummi court's interpretation of Yakima was correct, it would not have been "eminently reasonable" for the Yakima Court to refuse to sustain the State's excise tax.[7]

The Treaty of Point Elliot, pursuant to which the Lummi lands were allotted and later sold, see Lummi, 5 F.3d at 1356-57, is devoid of any reference or explicit consent to state taxation. This Court must grant the Tribe's Petition for Writ of Certiorari to alleviate the confusion created by the Ninth Circuit's misinterpretation and misapplication of Yakima to Lummi land allotted

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[7] Nor would it have been necessary for Congress to enact the Burke Act proviso or for the Yakima Court to analyze the proviso. Moreover, there would not have been any basis for the Court's decision invalidating the application of Washington's excise tax on the sale of Indian owned fee land.

under the Treaty; and to unequivocally reaffirm that states cannot tax land patented in fee pursuant to a statute other than the General Allotment Act unless the applicable statute also contains an explicit congressional grant of taxing authority to the states.

B. Modern Federal Policies Protect Lands Owned by an Indian Tribe from Encumbrance Absent Explicit Tribal Consent.

In 1934, Congress mandated that lands owned by or for the benefit of an Indian tribe, cannot be encumbered absent the expressed consent of the Tribe itself. In the Indian Reorganization Act, 25 U.S.C. 461 et seq. (hereafter the "IRA"), Congress provided that:

> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following powers: . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe . . ..

25 U.S.C. § 476 (emphasis added).[8] At the same time,

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[8] Neither the Yakima Indian Nation or the Lummi Indian Tribe is organized pursuant to the Indian Reorganization Act. The Blackfeet Tribe, amicus herein, is organized pursuant to the IRA. The Tribe's constitution, adopted in accordance with section 476, was approved by the Secretary of Interior on December 13, 1935. Article VI, Section 1 (c) provides that:

(continued...)

Congress initiated a policy to stop further allotments, freeze the trust status of allotted but not yet patented lands, and repurchase previously alienated Indian lands to rebuild the tribal land base. See 25 U.S.C. §§ 461-65; Yakima, 112 S.Ct. at 686, 698 n.6 (Blackmun J., concurring in part and dissenting in part). Congress' explicit reversal of these allotment-era policies together with the requirement of tribal consent to any encumbrance institutes a "modern" statutory policy of protecting all lands owned by an Indian tribe, whether in fee or in trust, from any encumbrance absent the consent of the tribe.

The Yakima Court, however, found that remnants of the General Allotment Act policy survived Congress' reversal of allotment-era policies. See Yakima 112 S.Ct.

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[8](...continued)

> The council of the Blackfeet Reservation shall exercise the following powers, subject to any limitations embodied in the statutes or the Constitution of the United States . .
>
> .
>
> * * *
>
> (c) To prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands or other tribal assets, without the consent of the Tribe.

The Blackfeet Reservation is located in Montana within and subject to the jurisdiction of the Ninth Circuit. That court's decision in Lummi is so broad that, if not reviewed and reversed by this Court, it will subsume and nullify the Tribe's power to prevent encumbrances on land owned in fee by the Tribe pursuant to Section 16 of the IRA and the Tribe's Constitution.

at 692. Specific General Allotment Act provisions may still continue to apply to parcels of land allotted under that Act. But, the modern federal policies set forth in the IRA and later congressional enactments, including the protections and prohibitions against encumbrances of land owned by Indian tribes, are explicitly directed toward preserving, protecting and enhancing the tribal land base. Those very explicit protections can only be obstructed by the remnants of the General Allotment Act to the extent Congress, as it did in the Burke Act proviso, explicitly provided the states with the authority to tax Indian land.[9] But the protections provided all tribal land pursuant to 25 U.S.C. § 476, in conjunction with the policies of reacquisition of tribal land promoted in the IRA, survive in all other respects and prohibit the states from encumbering any land owned by an Indian tribe, no matter how acquired.

The protections afforded tribally owned fee land under the IRA were recently affirmed by the Alaska Supreme Court In The Matter of 1981, 1982, 1983, 1984 and 1985 Delinquent Property Taxes Owed to the City of Nome, Alaska, 780 P.2d 363 (Ak. 1989). In that case, the City of Nome initiated a foreclosure proceeding in rem on two parcels of land purchased and owned in fee simple by "NEC, a group of Alaska Natives . . . organized

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[9] The constitutions of most IRA tribes, including the Blackfeet Tribe, specifically provide that the power of the tribe to prevent sales of and encumbrances on lands owned by the tribe is limited by Congress' plenary authority over Indian affairs. See, e.g., Constitution of the Blackfeet Tribe, Article VI, Section 1, quoted above at n.5. Therefore, to the extent Congress approved the application of state taxes on particular parcels of land in the Burke Act, that congressional grant limits the scope of the protections afforded in the Tribe's constitution.

under the IRA." Id. at 364, 365 n.3. The court held that "Section 16 of the IRA bars the City from foreclosing on NEC lands without the consent of NEC." Id. at 367. In reaching its holding the court found that the purpose of § 16 of the IRA, 25 U.S.C. § 476, was:

> to stop the erosion of the tribal land base in whatever form that erosion took.
>
> * * *
>
> [A]pplication of the provision to foreclosure proceedings will further that purpose.

Matter of City of Nome, Alaska, 780 P.2d at 367.

The Ninth Circuit failed to consider the impact of its overly broad decision on modern federal statutes and tribal enactments protecting tribally owned land from encumbrances. The court's decision is in direct conflict with the provisions of the IRA, and with the recent decision of the Supreme Court of the State of Alaska, a court within the territorial jurisdiction of the Ninth Circuit. This Court must issue the writ of certiorari to resolve these conflicts.

C. The Lands at Issue in Lummi are Owned by the Lummi Indian Tribe and Cannot be Alienated Without Federal Consent.

The Lummi court's reliance on alienation as the sole basis for upholding state taxation is fatally undermined because the land at issue is owned by the Lummi Indian Tribe and is not alienable without federal consent. See Non-Intercourse Act, Act of June 30, 1834, 4 Stat. 730, 25 U.S.C. § 177. Tribal consent also is required. See IRA, 25 U.S.C. § 476, discussed

supra.[10]

The Ninth Circuit erroneously concluded that alienability alone equates to tax liability, forcing the court to enter into a clearly flawed analysis of the applicability of the restraints on alienation imposed on Indian tribes under 25 U.S.C. § 177. As discussed in the Petition at 15-18, the clear language of that statute prohibits any "conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians . . .." 25 U.S.C. § 177. Only by appropriate congressional action can the statute's all-encompassing restrictions be modified or removed. See generally Petition at 16-17.[11] The Ninth

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[10] That the Yakima Court did not address the federal statutory restraints on alienation is not surprising. Contrary to the Ninth Circuit's interpretation, the Yakima Court did not rely on the General Allotment Act's waiver of the restraints on alienation as the grounds for upholding state taxation of the land. Rather, it was Congress' explicit grant in the Burke Act proviso that made the land, and only the land, taxable. See Yakima, 112 S.Ct. at 693-94.

[11] The restraints on an Indian tribe's ability to alienate land does not preclude Congress from subjecting those lands to various forms of state taxation, so long as Congress does so in clear and unambiguous terms. For example, Congress granted the states the authority to tax minerals derived from restricted Indian lands in the 1924 Mineral Leasing Act, Act of May 29, 1924, 43 Stat. 244, 25 U.S.C. § 398. See generally Montana v. Blackfeet Tribe, 471 U.S. 759. Moreover, the notion that alienation mandates taxation contradicts public land law policy prior to the enactment of the Federal Land Policy Management Act, Act of Oct. 21, 1976, 90 Stat. 2744, as amended,

(continued...)

Circuit's attempt to overcome the restrictions on alienation found in 25 U.S.C. § 177 "reduces ultimately to the proposition," cf. Yakima, 112 S.Ct. at 690, that the restraints against alienation of land by an Indian tribe were impliedly waived by allotment-era statutes that provided individual Indians with the authority to sell their land.[12] Implied waivers are not only strongly disfavored,

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[11](...continued)
43 U.S.C. § 1701, et seq. Pre-FLPMA public lands were subject to alienation under a variety of entry and homestead statutes. But, those lands were not subject to taxation by the states. (FLPMA prohibits to a substantial degree the Federal Government's authority to alienate the public lands.)

[12] Just as it is in Congress' hands to address the continuing viability of the General Allotment Act in light of the objectives of the Indian Reorganization Act, see generally Yakima, 112 S.Ct. at 692, it is within Congress' bailiwick, not the courts, to address the viability of the restrictions imposed under 25 U.S.C. §177 in light of later congressional policies. The Ninth Circuit, however, has seen fit to limit § 177's applicability to "pre-modern" land acquisitions by an Indian tribe. See Lummi, 5 F.3d at 1358-59. In creating this heretofore unheard of limitation on the protections afforded under 25 U.S.C. § 177, the court conveniently failed to recognize that the policies encapsulated in the Non-Intercourse Act were reinvigorated in the IRA, 25 U.S.C. § 476, and later federal Indian policies.

The Ninth Circuit also claims that prior alienation of Indian land implicitly repeals protections afforded Indian tribes when they acquire previously allotted and sold land. See Lummi, 5 F.3d at 1359. In carrying forth these
(continued...)

see Yakima, 112 S.Ct. at 690, quoting, Pasodas v. National City Bank, 296 U.S. 497, 503, 56 S.Ct. 349, 352, 80 L.Ed. 351 (1936), they are antithetical to the principle:

> deeply rooted in this Court's Indian jurisprudence: "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Montana v. Blackfeet Tribe of Indians, 471 U.S., at 766, 105 S.Ct., at 2403.

Yakima, 112 S.Ct. at 693.

The foundation of the Ninth Circuit's decision upholding state taxation of the Lummi Tribe's fee land -- alienability -- crumbles without an implied waiver of the restrictions imposed under 25 U.S.C. § 177. The writ of certiorari should be issued to make it clear that Congress has not impliedly limited the scope of protections afford all tribal land under 25 U.S.C. § 177.

CONCLUSION

As Judge Beezer noted in his dissent:

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[12](...continued)
congressionally repudiated allotment-era policies, the court fails to recognize that those policies contemplated the complete divestiture of tribal land holdings and the ultimate destruction of the tribes themselves. See generally C. Wilkinson, American Indians, Time and the Law, 19-23 (1967). It is, therefore, improbable that Congress even considered the impact of allotment and alienation on land acquisitions by Indian tribes.

> There is an appealing simplicity to the proposition that alienable land is taxable land. Unfortunately, federal Indian law does not have a simple history; no amount of wishing will give it a simple future.

Lummi, 5 F.3d. at 1360 (Beezer J., dissenting). The apparent simplicity offered by the Ninth Circuit's decision in reality offers nothing more than confusion and conflict. This Court should issue the writ of certiorari and resolve these conflicts in a manner consistent with the per se rule applicable to tribal-state taxation issues.

Respectfully submitted this 1st day of June, 1994

/s/
Jeanne S. Whiteing
Counsel of Record
Tod J. Smith
Whiteing & Thompson
1136 Pearl Street, Suite 203
Boulder, Colorado 80302
(303) 444-2549

Counsel for Amicus Curiae
Blackfeet Tribe of Indians

APPENDIX A

LUMMI INDIAN BUSINESS COUNCIL
1503 E Street, P.O. Box 5746, Bellingham, WA 98227 (206)647-0234
DEPARTMENT Reservation Attorney EXT

May 25, 1994

Ms. Jeanne S. Whiteing
WHITEING & THOMPSON
1136 Pearl Street, Suite 203
Boulder, CO 80302

RE: Lummi Indian Tribe v. Whatcom County

Dear Ms. Whiteing:

In response to your letter of May 25, the Lummi Indian Tribe is pleased to consent to the filing of an amicus curiae brief by the Blackfeet Indian Tribe in support of the Lummi Tribe's Petition for Writ of Certiorari in the above-referenced case.

Very truly yours,

OFFICE OF THE RESERVATION ATTORNEY

By
HARRY L. JOHNSEN

HLJ:slw

cc: LIT

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